IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LITTLE ITALY NEIGHBORHOOD ASSOCIATION, Petitioner, v. CITY OF WILMINGTON ZONING BOARD OF ADJUSTMENT, BEING DAVID BLANKENSHIP, HAROLD LINDSAY AND MARK PILNIC; and CORNERSTONE WEST COMMUNITY DEVELOPMENT CORPORATION, Respondents.	)	C.A. No.: 09A-09-003 FSS

Submitted: March 10, 2010
Decided: June 30, 2010

MEMORANDUM OPINION AND ORDER

Upon Petition for Writ of Certiorari to the City of Wilmington Zoning Board of Adjustment – *WRIT ALLOWED* and *VARIANCE DENIED*

SILVERMAN, J.

This is a neighborhood association's challenge, by way of certiorari, to a zoning board's granting a variance to a non-profit, community development corporation. The non-profit wants to construct a small apartment building in an area zoned for row houses, not apartments. The apartment building would serve a laudable, public purpose and it would look like row houses. Because actual row houses would not accomplish the project's goals as well as apartments, the Zoning Board of Adjustment concluded that the non-profit had demonstrated the "unnecessary hardship or exceptional practical difficulties" that must be shown in order to justify a variance.

Now, the court must first consider whether a neighborhood association like the one here has standing to pursue judicial review. If it does, the court must then consider whether the Board's view of what amounts to unnecessary hardship or exceptional practical difficulties is legally correct.

I.

On June 3, 2009, Cornerstone West Community Development Corporation, a non-profit, community development corporation, applied for several variances from the Board. One specific variance would allow Cornerstone to construct an eleven-unit apartment building on Cornerstone's land at Seventh and Dupont Streets, within Wilmington's "Little Italy" neighborhood. The building

would be used as a transitional home for transferring youths from foster care to independent living. The land is currently zoned R-3, "one-family row houses."[1] Although Cornerstone strongly emphasizes the ways its apartment building is consistent with the R-3 designation and the reasons why the building will fit in and be good for the neighborhood, the fact remains that the R-3 designation does not include apartment buildings. That, of course, is why Cornerstone needs a variance.

A Board hearing was held on August 12, 2009. Cornerstone explained that the apartment building would be built to look like row houses. Cornerstone admitted, however, that it is possible to build six row houses on the property consistent with R-3 zoning, and row houses would be less expensive than the apartment building. Cornerstone contended, nevertheless, that an apartment building would be better for everyone.

Specifically, Cornerstone's president explained:

> [O]ur original design was to build rowhouses, we had used rowhouse designing before and the benefit of this house as far as we can see is potentially sell in the future if we no longer needed them, the meet current zoning so if we were denied tonight we will go back to using the rowhouse model, and build rowhouses on the site, which it's zoned for. And certainly building rowhouses would be less

[1] *See* Wilm. C. § 48-134(a) ("The R-3 district, one-family row houses, is designed to conserve for one-family use those areas developed with one-family row houses which have not been converted to use by two or more families.").

> expensive, we estimate that the cost to build this over and above the rowhouse design would in total be about $400,000. The benefits, we think, to this three-story apartment is one entrance versus six entrances. If we were to build six buildings with two young people in each, we would have six entrances, more traffic, more street traffic than we think, and less control of who comes in and goes out of these young people's houses. This also affords a designated recreational area, some off-street parking, and obviously other security kinds of things that we talked about would not be as feasible in a rowhouse design. . . . So we thought it was safer for the residents and certainly minimize traffic to the community versus the rowhouse design.

Furthermore, Cornerstone agreed to sign a fifteen-year retention agreement so that if Cornerstone stopped using the building as a transitional facility, Cornerstone would pay a $250,000 penalty to the Federal Home Bank in Pittsburgh, Pennsylvania. In that event, Little Italy will likely be left with a commercial apartment building at Seventh and Dupont.

Little Italy Neighborhood Association, which, as its name implies, is a neighborhood association, objected to the variance allowing an apartment building in an R-3 district. Little Italy contended that the apartment building, even if it looked like neighboring row houses, would be inconsistent with the neighborhood's single-family character. Nevertheless, all three Board members voted for the apartment building variance.

The Board issued a one-paragraph decision granting Cornerstone's variances on August 17, 2009. As to the apartment building, the Board found that there were "circumstances of hardship or exceptional practical difficulty in that the proposed development would serve a community need by housing youth transitioning out of foster care facilities[.]" Specifically, the Board considered: "the building design will have the exterior appearance of townhouses"; "the building design would allow for the provision of enhanced security and monitoring systems"; "the proposed building setbacks would be consistent with those of other buildings in the vicinity"; "the variety of other uses in the immediate area, including commercial, institutional, and multi-family uses"; and that there was "significant public support for the request[.]" As a condition of approval, the Board held that the facility must be staffed twenty-four hours a day.

II.

Invoking 22 *Del. C.* § 328, Little Italy filed this timely, albeit mis-captioned, request for review on September 11, 2009. Under 22 *Del. C.* § 328:

> (a) Any person or persons, jointly or severally aggrieved by any decision of the board of adjustment, or any taxpayer . . . may present to the Superior Court a petition . . . setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality.
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> . . . .

> (b) Upon the presentation of the petition, the Court may allow a writ of certiorari directed to the board to review such decision of the board[.]
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> . . . .
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> (c) The Court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.[2]

Little Italy's initial pleading was captioned "Notice of Appeal." Technically, Little Italy should have captioned its pleading as a petition for a writ of certiorari.[3] The defective caption is only important because the standard of review on certiorari is narrower than for an appeal. On certiorari, the court is "confined to the record."[4]

When reviewing a board of adjustment decision, review is limited "to correcting errors of law and determining whether substantial evidence exists to support the Board's findings of fact."[5] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the Board's

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[2] 22 *Del. C.* § 328.

[3] *See Preston v. Bd. of Adjustment of New Castle County*, 772 A.2d 787, 789 (Del. 2001) ("It is a well-settled principle in Delaware that, wherever possible, appeals will not be dismissed on the basis of a technical defect.").

[4] *Hanley v. City of Wilmington Zoning Bd. of Adjustment*, 2000 WL 1211173, at *2 (Del. Super. Aug. 3, 2000) (Quillen, J.) ("Certiorari to the Superior Court is, in effect, an appeal, differing only by being confined to the record and requiring a mere ministerial act on the part of the Judge in ordering issuance of the writ.").

[5] *Rehoboth Art League, Inc. v. Bd. of Adjustment of the Town of Henlopen Acres*, 991 A.2d 1163, 1166 (Del. 2010).

conclusion."[6] When there is substantial evidence, the court "will not reweigh it or substitute [its] own judgment for that of the Board."[7]

Here, the decision does not turn on whether the Board's fact-finding was supported by substantial evidence. It was. This decision flows from the legal conclusions the Board drew from the facts. As a matter of law, the facts do not establish the unnecessary hardship or exceptional practical difficulties required to justify a zoning variance. As discussed below, in this zoning case, the ends do not justify the means.

III.

At the outset, Cornerstone argues that Little Italy does not have standing. Cornerstone asserts that Little Italy fails to meet the test set out in *Vassallo v. Penn Rose Civic Ass'n*,[8] particularly that Little Italy "has no property interest to defend and

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[6] *Wawa, Inc. v. New Castle County Bd. of Adjustment*, 929 A.2d 822, 830 (Del. Super. 2005).

[7] *Rehoboth Art League, Inc.*, 991 A.2d at 1166.

[8] 429 A.2d 168, 170 (Del. 1981) (Adopting four factors to consider when determining whether a group has standing:

> (1) whether the organization is capable of assuming an adversary position in the litigation;
> (2) whether the size and composition of the organization indicates that it is fairly representative of the neighborhood;
> (3) whether full participating membership in the organization is available to all residents and property owners in the community; and
> (4) whether the adverse effect of the challenged decision on the group

thus is not a true adversary in this matter." Cornerstone contends that "there is no evidence in the record to suggest that the size and composition of [Little Italy] is 'fairly representative' of the neighborhood . . . or whether full membership is available to all members of the community." Cornerstone further asserts that "there is no evidence . . . that suggests how [Little Italy] arrived at this position . . . and whether this position represents the view of the membership[.]"

Little Italy correctly responds that the proper standing test is now found in *Dover Historical Society v. City of Dover Planning Commission*.[9] Generally, as mentioned above, 22 *Del. C.* § 328 provides that a board of adjustment decision may be challenged by "[a]ny person or persons, jointly or severally aggrieved by any decision of the board of adjustment, or any taxpayer[.]" While *Vassallo* adopted a four-part test to determine organizational standing,[10] *Dover Historical Society* expressly holds: "In *Vassallo* . . . this Court set forth the . . . factors for determining whether a particular group has standing to challenge a zoning matter[.] . . . Thereafter, in *Oceanport Indus., Inc. v. Wilmington Stevedores*, this Court recognized the broader

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represented by the organization is within the zone of interests sought to be protected by the zoning law.).

[9] 838 A.2d 1103, 1115 (Del. 2003).

[10] *Vassallo*, 429 A.2d at 170.

federal three-part test to determine associational standing."[11] Thus, the test for determining standing is now the one provided in *Dover Historical Society*.

Under *Dover Historical Society*, an association has standing to bring suit when:

> (a) its members would otherwise have standing to sue in their own right;
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> (b) the interests it seeks to protect are germane to the organization's purpose; and
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> (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[12]

A.

As presented above, the operative standing test's first part is whether Little Italy's members would otherwise have standing to sue in their own right.[13] *Dover Historical Society* holds that "individuals who own land and/or reside in the . . . [d]istrict . . . do have standing to challenge the . . . action."[14]

Here, Little Italy's members are "residents and business people" of the

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[11] *Dover Historical Soc'y*, 838 A.2d at 1115; *see also Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 902 (Del. 1994).

[12] *Dover Historical Soc'y*, 838 A.2d at 1115.

[13] *Id.*

[14] *Id.*

neighborhood where the property is located. Specifically, the two named Little Italy members who opposed the variance either live in or own property in the neighborhood. One of them, Little Italy's "sergeant at arms," lives just a few blocks from the property. This satisfies the standing test's first part.

B.

Second, the interests Little Italy seeks to protect must be germane to Little Italy's purpose.[15] "The question whether one's interest is germane is 'undemanding' and requires only 'mere pertinence between the litigation subject and organizational purpose.'"[16] This bars "only those whose litigation goals and organization's purpose *are totally unrelated*."[17]

Little Italy's "mission statement" is "to develop and maintain a healthy and vibrant community in the West Side of Wilmington." Both the Little Italy neighborhood and the property are in Wilmington's west side. The organization's goals include:

> • To offer the best quality services to customers, visitors, and residents;

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[15] *Id.*

[16] *Oceanport Indus., Inc.*, 636 A.2d at 902.

[17] *Id.* (emphasis in original).

> • To ensure that our community is a safe place to work, visit, and live;
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> • To keep our neighborhood clean and attractive;
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> • To increase the availability of parking in our community;
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> • To recognize our individual needs and differences; to work together for the common good;
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> • To increase the number of businesses, homeowners, and customers and to promote a sense of pride of ownership of our valuable properties;
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> • To educate and communicate to others about the wonderful attributes of our community;
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> • To advocate for public services for our community and seek funding for enhancements;
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> • To reduce the number of vacant and substandard buildings in the community;
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> • To work with landlords to attain responsible tenant quality housing stock.

When objecting to the variance, Little Italy's sergeant at arms voiced concern about the property's being used for rentals, as opposed to home ownership. He also explained Little Italy's concern for safety issues and aesthetic problems, and stated that Little Italy was "concerned about the health and welfare of the neighborhood. . . . [W]e're here to provide or try to promote home ownership." Thus, Little Italy's interests here are germane to its purpose.

C.

The standing test's third part is that neither the claim asserted nor the

relief requested requires participation of Little Italy's individual members in the lawsuit.[18] Examples of situations where individual member participation is required are when money damages are claimed, where the relief granted would actively affect individual members, and where members would need to testify or otherwise participate for the court to analyze the issues.[19] Little Italy's opposition does not require Little Italy's individual members. Accordingly, taking everything into account, Little Italy has standing.

IV.

A.

Little Italy contends that the variance was a "use variance," and that a use variance "may only be granted based on the demonstration of 'unnecessary hardship.'" Little Italy claims that "[a] use variance should be reversed when the record evidence is not substantial enough to justify a finding of unnecessary hardship." Little Italy further asserts that "it was Cornerstone's burden to establish at the [Board] Hearing that it could not feasibly use the Property for purposes permitted under the R-3/one-family rowhouse zoning category." Little Italy also

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[18] *Dover Historical Soc'y*, 838 A.2d at 1115.

[19] *See Oceanport Indus., Inc.*, 636 A.2d at 902.

contends that "[t]he [Board] Decision is fatally flawed on the grounds that it fails to articulate any legally valid basis to support a finding of unnecessary hardship."

Under 22 *Del. C.* § 327, the Board may:

> Authorize, in specific cases, such variance . . . that will not be contrary to the public interest, where, owing to special conditions or exceptional situations, a literal interpretation of any zoning ordinances, code or regulation will result in *unnecessary hardship or exceptional practical difficulties to the owner of property* so that the spirit of the ordinance, code or regulation shall be observed and substantial justice done, provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map[.][20]

Generally, "[a] use variance changes the character of the zoned district by permitting an otherwise proscribed use. . . . A use variance may be granted by the Board . . . where it is in the public interest to do so and the variance is needed to avoid unnecessary hardship and injustice."[21]

As set out above, 22 *Del. C.* § 327 expressly provides that the Board may grant variances where "a literal interpretation of any zoning ordinances, code or regulation will result in unnecessary hardship or exceptional practical difficulties to

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[20] 22 *Del. C.* § 327 (emphasis added).

[21] *Hanley*, 2000 WL 1211173, at *3.

the owner of property[.]" That means the Board had to decide whether Cornerstone had demonstrated that the restriction on apartments would result in an unnecessary hardship or exceptional practical difficulties to Cornerstone.[22]

B.

"The [variance] applicant bears a heavy burden of showing unnecessary hardship, since it is recognized that a prohibited use, if permitted, would result in a use of the land in a manner inconsistent with the basic character of the zone."[23] To demonstrate unnecessary hardship, Cornerstone had to show that:

> (a) the land cannot yield a reasonable return if used only for the permitted use, (b) need for the variance is due to unique circumstances and not general conditions in the neighborhood which reflect unreasonableness of the zoning ordinance itself, and (c) the use sought will not alter the essential character of the locality. It is also a jurisdictional prerequisite that the applicant show in terms of monetary proof that all uses permitted on the land under existing zoning are economically unfeasible before a variance of this type may be granted.[24]

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[22]*See Baker v. Bd. of Adjustment of the City of Wilmington*, 1985 WL 188991, at *1 (Del. Super. Apr. 4, 1985) (O'Hara, J.) ("[W]hen a variance is sought in the City of Wilmington, 22 *Del. C.* § 327(a)(3) is the legal standard to be applied, and therefore, that the applicant must demonstrate 'unnecessary hardship' pursuant to that section.").

[23]*Baker v. Connell*, 488 A.2d 1303, 1307 (Del. 1985); *see also Hanley v. City of Wilmington Bd. of Adjustment*, 2002 WL 1397135, at *2 (Del. Super. June 27, 2002) (Carpenter, J.).

[24]*Connell*, 488 A.2d at 1307.

Cornerstone requested the variance because "[t]he benefit[] . . . to this three-story apartment is one entrance[.]" Cornerstone claimed that, with more than one entrance, there would be "more street traffic . . . and less control of who comes in and goes out of these young people's houses." Cornerstone also asserted that this would also "afford[] a designated recreational area, some off-street parking, and obviously other security kinds of things that . . . would not be as feasible in a rowhouse design." Cornerstone "thought it was safer for the residents and certainly [would] minimize traffic to the community versus the rowhouse design."

In *toto*, the Board held:

> [T]he application could be granted without substantially impairing the general purpose and intent of the Building Zone Ordinance and that it would not adversely affect the character of the neighborhood, and there being circumstances of hardship or exceptional practical difficulty in that the proposed development would serve a community need by housing youth transitioning out of foster care facilities; and considering that the building design will have the exterior appearance of townhouses; and considering that the building design would allow for the provision of enhanced security and monitoring systems; and considering that the proposed building setbacks would be consistent with those of other buildings in the vicinity; and considering the variety of other uses in the immediate area, including commercial, institutional and multi-family uses; and there being significant public support for the request[.]

C.

At this point, the Board's findings that: the variance will not impair the zoning ordinance's purpose, the building will be consistent with the neighborhood's appearance and character, the project serves a community need, the building will provide enhanced security, and there is significant public support for the variance, are unassailable. There may be room to argue about some of the findings, but they are supported by substantial evidence. The concern is with the basis for the conclusion that Cornerstone's complying with the R-3 zoning presents "unnecessary hardship or exceptional practical difficulties to" Cornerstone.

Just as the Board's specific findings mentioned above are unassailable, it is also unassailable that Cornerstone's property can yield a reasonable return without a variance and that Cornerstone's need for the variance is due to the way Cornerstone prefers to use its land. Thus, it cannot be said that Cornerstone demonstrated that it would experience unnecessary hardship or difficulty by complying with the zoning law.[25] Cornerstone's hardships and difficulties are

[25] *See Baker*, 1985 WL 188991, at *1; 22 *Del. C.* § 327.

personal to Cornerstone, and "[p]ersonal hardships, regardless of how compelling . . ., do not provide sufficient grounds for the granting of a variance."[26]

As mentioned, Cornerstone admitted that its "original design was to build [six] rowhouses[.]" Cornerstone "had used rowhouse designing before," and the original design would "meet current zoning so if [Cornerstone was] denied [the variance] . . . [Cornerstone] will go back to using the rowhouse model, and build rowhouses on the site, which it's zoned for." Cornerstone also explained that "certainly building rowhouses would be less expensive, we estimate that the cost to build this over and above the rowhouse design would in total be about $400,000." This does not demonstrate that building the row houses would be economically unfeasible.[27] To the contrary, it is tacitly conceded that Cornerstone could put its land to an economically productive use consistent with the zoning.

Although Cornerstone emphasizes that the property is "located in primarily a commercial area," the Supreme Court of Delaware has held that simply because there are other multi-unit buildings or nearby commercial districts, that "is

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[26] *Garibaldi v. Zoning Bd. of Appeals of City of Norwalk*, 303 A.2d 743, 745 (Conn. 1972).

[27] *See Connell*, 488 A.2d at 1307.

not a per se ground for granting an exception or variance."[28] Cornerstone's preference for apartments is based on the desirability of increased security and other alleged benefits offered by an apartment building, but that does not satisfy 22 *Del. C.* § 327. Notably, when asked at the hearing about the foster care youths' criminal statistics, Cornerstone stated: "Out of [] 164 people, young people [who] have been through our program over the last seven years[,] only four of them have ever been convicted . . . of a crime." But, a desire to make an apartment building that is more efficient and secure does not establish hardship or difficulty.

Moreover, the Board did not find that Cornerstone would experience "unnecessary hardship." Rather, it found that there were "circumstances of hardship or exceptional practical difficulty in that the proposed development would serve a community need by housing youth transitioning out of foster care facilities[.]" That finding implies that the Board reasoned that Cornerstone and its project were good, but the zoning law's restrictions stood in Cornerstone's and the project's way. Therefore, the zoning law posed a hardship or practical difficulty justifying a variance.

[28] *Id.* at 1308.

The only way the Board's reasoning works is if section 327's distinct elements are blurred to create a relaxed and broader definition of "unnecessary hardship or exceptional practical difficulties" when a property owner is pursuing a project deemed desirable by the Board. Under that view, the Board could look at the property owner's nature and goals and decide if the zoning law creates a hardship. But, section 327's elements – public interest, special conditions, unnecessary hardship, and so on – are distinct. Each must be satisfied before a variance is justified, and there is no exception for non-profit owners and worthy projects.

Generally, variances are not granted due to the property owner's personal need.[29] More specifically, the Wilmington City Code provides a comprehensive list of uses permitted by right or by Board approval in R-3 districts.[30] If the City Counsel wanted to allow for transitional facilities, or provide a general exception to the zoning law in R-3 districts for the public good, it could have called

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[29] *See, e.g., Application of Devereux Found.*, 41 A.2d 744 (Pa. 1945) (affirming lower court's reversal of Board's grant of educational institution's variance to permit construction of developmentally challenged boys' dormitory due to failure to demonstrate unnecessary hardship); *see generally Howard v. City of Beavercreek*, 276 F.3d 802, 804 (6th Cir. 2002) (applicant with post traumatic stress disorder denied variance to build a fence on his property to eliminate undue stress); *Woodward v. City of Paris*, 520 F. Supp. 2d 911, 913 (W.D. Tenn. 2007) (applicant with multiple sclerosis and confined to motorized chair denied variance to construct a carport on her property); *Aronson v. Bd. of Appeals of Stoneham*, 211 N.E.2d 228, 229 (Mass. 1965) (reversing Board's grant of variance to allow applicants to construct a porch for use by their disabled child); *Carney v. City of Baltimore*, 93 A.2d 74, 75-77 (Md. 1952) (disabled applicant denied exception to zoning ordinance to build addition for first-floor bedroom and bathroom).

[30] *See* Wilm. C. § 48-134.

for that. As it is, however, the Board may not grant a variance simply because a project is in the property owner's interest, it serves an altruistic purpose, and there is public support for it. "Even a desired, needed or justified change in a zoning scheme or ordinance is no ground for a variance."[31]

V.

For the foregoing reasons, the Board's August 17, 2009, decision granting Cornerstone West Community Development Corporation's variance to construct an eleven-unit apartment building at Seventh and Dupont Streets in Wilmington is **REVERSED** and the variance is **DENIED**.[32]

IT IS SO ORDERED.

Judge

cc: Prothonotary (civil)
Richard L. Abbott, Esquire
John E. Tracey, Esquire
Daniel F. McAllister, Esquire

[31] *Connell*, 488 A.2d at 1308.

[32] *See Hanley*, 2000 WL 1211173, at *3 ("This Court and the Delaware Supreme Court have determined that cases cannot be remanded by the Superior Court to the Board of Adjustment.").